8-20-2014

# Shearin v. State Respondent's Brief Dckt. 41094

IN THE SUPREME COURT OF THE STATE OF IDAHO



| | | |
|---|---|---|
| BILLY RAYMOND SHEARIN,<br><br>Petitioner-Appellant,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent. | ) | No. 41094<br><br>Ada Co. Case No.<br>CV-2012-3004 |

# BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL E. WETHERELL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

JOHN C. McKINNEY
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

BILLY RAYMOND SHEARIN
IDOC # 37468
ISCI, Unit 9, Tier C
PO Box 14
Boise, ID 83707

PRO SE
PETITIONER-APPELLANT

# TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

Nature Of The Case ..... 1

Statement Of Facts And Course Of Proceedings ..... 1

ISSUES ..... 6

ARGUMENT ..... 7

Shearin Has Failed To Show Error In The District Court's Denial Of His Petition For Post-Conviction Relief ..... 7

A. Introduction ..... 7

B. Standard Of Review ..... 8

C. Shearin Failed To Show That His Trial Counsel's Performance Was Constitutionally Ineffective ..... 8

D. Shearin's Claim That The SAPD Was Ineffective For Withdrawing From Representing Him In This Appeal Is Not Properly Before The Court And Otherwise Lacks Merit ..... 14

CONCLUSION ..... 15

CERTIFICATE OF MAILING ..... 16

APPENDIX A

# TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| Aragon v. State, 114 Idaho 758, 760 P.2d 1174 (1988) | 9 |
| Coleman v. Thompson, 501 U.S. 722 (1991) | 14 |
| Cowger v. State, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999) | 9 |
| Davis v. State, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989) | 9 |
| Dunlick, Inc. v. Utah-Idaho Concrete Pipe Co., 77 Idaho 499, 295 P.2d 700 (1956) | 14 |
| Estes v. State, 111 Idaho 430, 725 P.2d 135 (1986) | 8 |
| Gibson v. State, 110 Idaho 631, 718 P.2d 283 (1986) | 9 |
| Mitchell v. State, 132 Idaho 274, 971 P.2d 727 (1998) | 8 |
| Murphy v. State, 156 Idaho 389, 327 P.3d 365 (2014) | 14, 15 |
| Murray v. State, 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992) | 8 |
| Peterson v. State, 139 Idaho 95, 73 P.3d 108 (Ct. App. 2003) | 8 |
| Piro v. State, 146 Idaho 86, 190 P.3d 905 (Ct. App. 2008) | 9 |
| Samson v. California, 547 U.S. 843 (2006) | 11, 12, 13 |
| Sanders v. State, 117 Idaho 939, 792 P.2d 964 (Ct. App. 1990) | 8 |
| State v. Averett, 142 Idaho 879, 136 P.3d 350 (Ct. App. 2006) | 14 |
| State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989) | 8 |
| State v. Fisher, 123 Idaho 481, 849 P.2d 942 (1993) | 14 |
| State v. Fodge, 121 Idaho 192, 824 P.2d 123 (1992) | 14 |
| State v. Gawron, 112 Idaho 841, 736 P.2d 1295 (1987) | 11 |
| State v. Grube, 126 Idaho 377, 883 P.2d 1069 (1994) | 14 |
| State v. Huntsman, 146 Idaho 580, 199 P.3d 155 (Ct. App. 2008) | 14 |

State v. Morris, 28 Idaho 599, 155 P. 296 (1916) ..... 10

State v. Shackelford, 150 Idaho 355, 247 P.3d 582 (2010) ..... 9

Strickland v. Washington, 466 U.S. 668 (1984) ..... 9

United States v. Knights, 534 U.S. 112 (2001) ..... 11

United States v. Richardson, 849 F.2d 439 (9th Cir. 1988) ..... 11

## STATUTES

I.C. § 73-113 ..... 10

## RULES

I.C.R. 57(c) ..... 8

## OTHER AUTHORITIES

Merriam-Webster Online Dictionary 2014
http://www.merriam-webster.com (8/14/04) ..... 10

## STATEMENT OF THE CASE

### Nature Of The Case

Billy Raymond Shearin appeals from the district court's denial of his petition for post-conviction relief after an evidentiary hearing.

### Statement Of Facts And Course Of Proceedings

In its Order Re: Hearing on Petition Held May 1, 2013, the district court described the facts and proceedings of Shearin's underlying criminal case as follows:

> On December 15, 2011, [Shearin] following a plea of guilty was sentenced to 10 years in prison with $3^1/_2$ years fixed and $6^1/_2$ years indeterminate, for the crime of Burglary, a felony. . . . In return for his plea of guilty, the state dismissed five other charges against [Shearin] which included two additional counts of Burglary and three counts of petit theft. Upon conviction, [Shearin] could have received sentences of up to 23 years of incarceration and $103,000.00 in fines on the dismissed counts. No appeal was filed in the case. At the times relevant to [Shearin's] claim that evidence in this case was illegally obtained, he was on parole in Ada County case number H0600597, subject to the terms of a parole agreement reproduced as defendant's exhibit "A" admitted at the hearing on the petition. Condition number 8 of this agreement states that "Parolee will submit to a search of person or property, to include residence and vehicle, at any time and place by any agent of Field and Community Services and s/he does waive [sic] constitutional right to be free from such searching."

(R., p.74.)[1]

On February 21, 2012, Shearin filed a petition for post-conviction relief (R., pp.4-8), and the court appointed counsel (R., pp.27-29) who filed an amended petition presenting two ineffective assistance of trial counsel claims: (1) failure "to file a motion

[1] References to page numbers are based on the numbers appearing on the Adobe Reader pdf. format of the Clerk's Record.

to suppress evidence obtained from a search of his vehicle by Boise police that yielded incriminating evidence[,]" based on Shearin's contention that his parole agreement only authorized a parole officer to conduct such a search, and (2) failure to file a notice of appeal upon Shearin's request (R., pp.35-39, 74-75). After the court set an evidentiary hearing date (R., p.63), the state filed an Answer (R., pp.69-72). The court detailed the facts presented at the hearing as follows:

> . . . The charges . . . stemmed from the theft of high-end athletic apparel from a Fred Meyer store located on West Franklin and Overland Road in Boise, Idaho. On June 21, 2011, Boise police responded to a call from a loss prevention manager at the store's location. [Tr., p.82, Ls.8-25.] The manager had spotted Mr. Shearin in the store and, believing him to be involved in a series of thefts from Fred Meyer stores in other locations as well, called Boise police to alert them to his presence. [Tr., p.82, L.18 - p.85, L.17.]
>
> When officers arrived, Mr. Shearin was seen exiting onto and across Orchard Street without stopping at a stop sign. In the course of the resulting traffic stop, officers discovered that Mr. Shearin was driving on a suspended license and arrested him. [Tr., p.85, L.25 - p.87, L.12; p.100, Ls.2-5.] Officers also learned that he was on parole, and contacted Mr. Bill Rowen, a supervisor at the Department of Probation and Parole, who in turn directed parole agent Layla Jeffries to respond to the location where the petitioner and his vehicle were located. [Tr., p.10, L.14 - p.11, L.4; p.20, L.25 - p.22, L.3.]
>
> As stated, condition eight of the petitioner's conditions of parole, which he had initialed and signed in front of a notary on or about November 5, 2009, provides that "Parolee will submit to a search of person or property, to include residence or vehicle, at any time and place by any agent of Field and Community Services, and s/he does waive [sic] Constitutional right to be free from such searching." [Tr., p.12, L.20 - p.19, L.3.] *See* Petitioner's Ex. "A". It is agreed in this case that the responding parole agent dispatched to the scene by the supervisor was agent Layla Jeffries, and that while on route, she authorized Boise police to conduct the search of the vehicle pending her arrival at the scene. [Tr., p.87, Ls.17-25; p.98, L.18 - p.99, L.17.] It is undisputed that Ms. Jeffries was not the agent regularly assigned to the petitioner, but was dispatched by the on-duty supervisor because the petitioner's regular agent, Ms. Rhoda

Faust, was attending a training program at the time. [Tr., p.8, L.15 - p.11, L.8.]

Ms. Jeffries arrived at the scene after the search of the vehicle was begun, but before it was completed. [Tr., p.24, L.1 - p.25, L.3; p.98, L.18 - p.99, L.6.] She recalled seeing a duffel bag discovered by the police with what appeared to be stolen clothing in the trunk, but could not recall whether the trunk was open when she arrived. [Tr., p.23, L.21 - p.25, L.8.] As a result of this discovery, Ms. Jeffries went with Boise police to the defendant's residence, and conducted a further search there. [Tr., p.25, L. 9 - p.26, L.1.] Ms. Jeffries did participate in this search, but concedes that Boise police did the majority of the searching while she remained with the petitioner. [Tr., p.25, L.20 - p.26, L.1.] She further testified that in accordance with her usual practice in similar situations, she would have conducted the search of the petitioner's house whether the officers had suggested it or not. [Tr., p.26, L.13 - p.27, L.17.]

Out of the preceding facts, the only significant conflicting testimony was between an officer of the Boise police, who believed that Ms. Jeffries requested the search to be started while she was on her way to the scene [Tr., p.87, Ls.17-25; p.98, L.18 - p.99, L.12], and another officer who stated that the on-duty supervisor for the department of Probation and Parole had advised him that Boise police could search on behalf of the department while the supervisor arranged for a parole agent to come to the scene [Tr., p.109, L.1 - p.110, L.19]. As to the petitioner's claims that Ms. Comstock failed to file a direct appeal and a motion under Idaho Criminal Rule 35 when asked to do so, the facts are not as clear. The petitioner states that he requested an appeal be filed. [Tr., p.40, L.10 - p.42, L.3.] Ms. Comstock testified that she recalls no such request, and that given the absence of any notation in her file that such a request had been made, she did not believe it had been made. [Tr., p.59, L.12 - p.63, L.11; p.77, L.15 - p.79, L.21.] She further testified that had the petitioner clearly requested an appeal, her practice was to have the paralegal prepare the notice for filing immediately upon leaving the courtroom following sentencing, and that did not happen here. [Id.] The defendant further stated that he tried to call Ms. Comstock several times to discuss an appeal with her, but could not get in touch with her. [Tr., p.43, Ls.15-21; p.124, L.24 - p.125, L.24.] He admits, however, that he left no messages on these occasions. [Tr., p.126, L.23 - p.127, L.11.]

(R., pp.76-77 (supplemented with bracketed references to the record).)

After the evidentiary hearing, the district court entered a written decision denying Shearin's claims.[2] (R., pp.73-95.) First, the court concluded that the stop of Shearin's vehicle by law enforcement was justified because there was reason to believe Shearin was involved in "the illegal activity of burglary and theft from Fred Meyer stores based upon the statements made to them by the loss prevention manager[,]" and Shearin "had violated a traffic law due to the 'California stop' observed by the officer." (R., pp.89-90.)

In regard to the search of Shearin's vehicle, the district court concluded that the police who conducted the search "were acting as 'agents' of Field and Community Services pursuant to the search condition in [Shearin's] parole agreement, of which he was fully aware[,]" and it was irrelevant "that the search was commenced by police prior to the probation officer's arrival on the scene." (R., pp.90-91.) As an alternative basis justifying the search of Shearin's vehicle, the court held that, after stopping Shearin's vehicle for a traffic violation, and "upon seeing apparel in plain view inside the vehicle consistent with information provided to police by Fred Meyer, police had reasonable suspicion and/or probable cause to search the rest of the vehicle for further evidence consistent with the reported thefts irrespective of [Shearin's] Fourth Amendment waiver under the 'automobile exception' to the search warrant requirement." (R., p.91.)

Lastly, the district court held that Shearin failed to show he made an unequivocal request to his trial counsel to file an appeal, and therefore failed to meet his burden to

---

[2] The district court explained that, although not included as a claim in Shearin's amended petition, based on the consent of the parties at the evidentiary hearing, the court also considered Shearin's claim that his trial counsel was ineffective for failing to file a Rule 35 motion for reduction of sentence. (R., p.73.) At the conclusion of the evidentiary hearing, the court denied that claim, explaining that, because it would not have reduced Shearin's sentences if a Rule 35 motion had been filed, trial counsel was not ineffective for failing to file such a motion. (R., p.75; Tr., p.143, L.17 - p.145, L.18.)

show ineffective assistance of his appointed counsel. (R., pp.92-94.) Shearin timely appealed. (R., pp.98-100.)

## ISSUES

Shearin states the issues on appeal as:

> Did the District Court err when it dismissed the Petition for Post Conviction Relief?
>
> Was the Office of the State Appellate Defender ineffective when it did not litigate to this Court [sic] claims of ineffective assistance of counsel?

(Appellant's Brief, p.10.)

The state rephrases the issue on appeal as:

Has Shearin failed to show error in the district court's denial of his petition for post-conviction relief?

## ARGUMENT

### Shearin Has Failed To Show Error In The District Court's Denial Of His Petition For Post-Conviction Relief

#### A. Introduction

Shearin appeals the district court's denial of his post-conviction claims -- that his trial counsel's performance was constitutionally ineffective because she failed to file a motion to suppress evidence resulting from the stop and search of Shearin's vehicle, and failed to file a notice of appeal. (Appellant's Brief, pp.10-20.) Shearin additionally argues, "the office of the State Appellate Defender was ineffective for not litigating these claims on appeal."[3] (Appellant's Brief, p.21 (capitalization modified).)

A review of the record and applicable legal standards confirms that Shearin failed to meet his burden to prove his allegations, and the district court correctly denied his claims. Shearin's claim that his trial counsel was ineffective for not filing a suppression motion fails because there was no valid legal basis to file such a motion, therefore trial counsel could not have been ineffective for failing to do so. In regard to trial counsel's alleged failure to file an appeal at Shearin's request, Shearin essentially asks this Court to second-guess the district court's credibility determinations, contrary to established standards of review. Finally, Shearin's contention that his former counsel in this appeal provided ineffective assistance is not a viable claim because that claim has not been preserved for appeal because it has not been presented, much less decided, by the

[3] This Court previously granted a motion by the Office of the State Appellate Defender to withdraw from representing Shearin in this appeal. (See 3/14/14 Order Granting Motion for Leave to Withdraw and to Suspend the Briefing Schedule.)

district court; moreover, there is no constitutional right to effective assistance of counsel in a post-conviction proceeding.

B. Standard Of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. I.C.R. 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Where the district court conducts a hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003).

C. Shearin Failed To Show That His Trial Counsel's Performance Was Constitutionally Ineffective

A petitioner seeking relief on a claim of ineffective assistance of counsel must prove "that his counsel was deficient in his performance and that this deficiency resulted in prejudice." Murray v. State, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992) (citing State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989)). To establish deficient performance the petitioner must overcome a strong presumption that counsel

performed within the wide range of professional assistance by proving trial counsel's actions fell below an objective standard of reasonableness. State v. Shackelford, 150 Idaho 355, 382, 247 P.3d 582, 609 (2010); Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To meet this burden "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984).

To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Specifically, in order to prove the prejudice prong of the Strickland test where the petitioner alleges counsel failed to inform him of a plea offer, he must prove there was a reasonable probability he would have accepted the offer. Piro v. State, 146 Idaho 86, 94, 190 P.3d 905, 913 (Ct. App. 2008).

The district court utilized these standards in analyzing Shearin's claims, and relied on its own credibility determinations in concluding that Shearin failed to show either that his appointed counsel was deficient, or that he suffered prejudice from any deficiency. (R., pp.78-94.) Application of the correct legal standards to the evidence presented demonstrates the district court did not err in denying Shearin's post-conviction claims. Shearin's argument that the district court erred in denying his two post-conviction claims is completely rebutted by the district court's "Order Re: Hearing

on Petition Held May 1, 2013" (R., pp.73-95), attached as Appendix A, which is incorporated into this Respondent's Brief and relied upon as if fully set forth herein.

The state makes the following argument as a supplement to the district court's well-reasoned analysis in regard to Shearin's suppression-based ineffective assistance of trial counsel claim. On appeal, Shearin contends, as he did below, that "the waiver he signed only authorized his parole officer to conduct such searches, and was not able to be transferred to another person or agency without the consent of the Appellant/Petitioner." (Appellant's Brief, p.13.) Paragraph 8 of Shearin's parole-agreement waiver in this case stated:

> Parolee will submit to a search of person or property, to include residence and vehicle, at any time and place by any agent of Field and Community Services and s/he does waive [sic] constitutional right to be free from such searching.

(Def. Ex. A.) Shearin agreed to this term of the parole-agreement, thereby agreeing that he had no Fourth Amendment right to be free from a search "by any agent of Field and Community Services." The district court held:

> While condition eight of the petitioner's parole agreement refers only to agents of Field and Community Services, the term 'agent' is undefined and . . . the Court believes it should be read to allow law enforcement personnel acting on the authority of Field and Community Services to conduct the searches contemplated by that condition, as was the case here. Idaho law requires terms not defined to be given their everyday meaning as commonly understood. I.C. § 73-113. State v. Morris, 28 Idaho 599, 155 P. 296 (1916).

(R., pp.90-91.)

According to the Merriam-Webster Online Dictionary, an agent is "a person who does business for another person: a person who acts on behalf of another." Merriam-Webster Online Dictionary 2014. http://www.merriam-webster.com (8/14/04). The

parole officer in this case authorized Boise City Police Officers to act in her place in conducting a search of Shearin's vehicle. This is the very definition of an agent. The fact that the parole officer did not personally attend the search is of no constitutional significance. Cf. United States v. Richardson, 849 F.2d 439, 442 (9th Cir. 1988) (noting that requiring the probation officer's physical presence during every probation search would unnecessarily interfere with the twin goals of probation: rehabilitation of the probationer and protection of society), overruled on other grounds by United States v. Knights, 534 U.S. 112, 121-22 (2001).

Shearin has failed to show any error in the district court's analysis and conclusion that, under the everyday meaning as commonly understood, the police officers were acting as agents of the parole officer when they searched Shearin's vehicle pursuant to the parole officer's authorization.

Moreover, even without Shearin's signed conditions of parole, the search of his vehicle by police officers was justified. Parolees and probationers enjoy a reduced expectation of privacy against governmental intrusion. Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001). The United States Supreme Court has held that probationers and parolees, due to their status as such, have a diminished expectation of privacy for purposes of the Fourth Amendment. United States v. Knights, 534 U.S. 112 (2001). The Idaho Supreme Court recognized this same diminished expectation of privacy in State v. Gawron,112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987), stating: "persons conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by government authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional

constitutional concepts." Applying this principle to the police search of Shearin's vehicle -- at the request of the parole officer -- supports the conclusion that the search was not unconstitutional. The Supreme Court's opinion in Samson v. California, 547 U.S. 843 (2006), is instructive.

In Samson, the Court "granted certiorari to decide whether a suspicionless search, conducted under the authority [of a statute authorizing a search without a warrant or probable cause], violates the Constitution." 547 U.S. at 846. The Court held "it does not." Id. In reaching this conclusion, the Court noted its prior conclusion in Knights that probationers and parolees have a diminished expectation of privacy. Id. at 847-849. The Court reasoned:

> As we noted in *Knights*, parolees are on the "continuum" of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, parole is an established variation on imprisonment of convicted criminals . . .. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements.
>
> . . . The extent and reach of [California's] parole conditions clearly demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone.

Samson, 547 U.S. at 850 (citations and quotations omitted).

Based upon a parolee's reduced expectation of privacy and the state's interests in the ability to regulate those released on parole, the Court in Samson concluded that "[i]mposing a reasonable suspicion requirement" on the ability to search a parolee "would give parolees greater opportunity to anticipate searches and conceal criminality."

Samson, 547 U.S. at 854. Accordingly, the Court held "that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." Id. at 856.

Although Samson involved actions taken pursuant to a statute that permitted suspicionless searches, the holding of the case stands for the broader proposition that such searches do not violate the Fourth Amendment. 547 U.S. at 856. It logically follows from this holding that police officers could do precisely what they did in this case without running afoul of the Fourth Amendment, *i.e.*, search the vehicle belonging to Shearin, who was on parole, without any suspicion whatsoever.[4] Indeed, police officers exceeded this minimum standard by virtue of their knowledge that Shearin was, as reported by the loss prevention manager from Fred Meyer, likely engaged in criminal activity -- namely burglary. Therefore, even though a suspicionless search would have been legally justified on the sole fact that Shearin was a parolee, the officers had a reasonable basis, if not a "reasonable suspicion," for searching Shearin's vehicle.

Because the search of Shearin's vehicle was constitutionally permissible, he has failed to show he is entitled to suppression of any evidence found as a result of that search.

---

[4] Shearin's complaint that the district court cited cases involving probation instead of parole does not benefit his position. (See Appellant's Brief, pp.13-15.) As explained in Samson, "[o]n this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." 547 U.S. at 850.

D. Shearin's Claim That The SAPD Was Ineffective For Withdrawing From Representing Him In This Appeal Is Not Properly Before The Court And Otherwise Lacks Merit

Shearin's argument that the SAPD provided ineffective assistance by withdrawing from this appeal is not properly before the Court and otherwise lacks merit. (See Appellant's Brief, p.21.)

First, Shearin's claim that the SAPD provided ineffective assistance by withdrawing its representation of him in this appeal is unpreserved because he has never presented it to the district court. It is well settled that issues not raised below will generally not be considered for the first time on appeal. State v. Averett, 142 Idaho 879, 888-89, 136 P.3d 350, 359-60 (Ct. App. 2006); State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). It is also well settled "that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." State v. Huntsman, 146 Idaho 580, 585, 199 P.3d 155, 160 (Ct. App. 2008); State v. Grube, 126 Idaho 377, 387, 883 P.2d 1069, 1079 (1994) (citing State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993); Dunlick, Inc. v. Utah-Idaho Concrete Pipe Co., 77 Idaho 499, 502, 295 P.2d 700, 702 (1956)).

It is Shearin's burden to adequately raise, in the district court, his claim that the SAPD provided ineffective assistance by withdrawing from this appeal, and to obtain an adverse ruling before presenting it on appeal. Because Shearin has not presented his claim in the district court, he has failed to preserve it on appeal.

Second, in Murphy v. State, 156 Idaho 389, 327 P.3d 365 (2014), the Idaho Supreme Court acknowledged that in Coleman v. Thompson, 501 U.S. 722, 752 (1991), the United States Supreme Court ruled, in the context of a federal habeas corpus claim,

that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings," "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Consistent with Coleman, the Idaho Supreme Court held: "we do not recognize an independent right to effective assistance of counsel during post-conviction proceedings." Murphy, 156 Idaho at __, 327 P.3d at 372. Inasmuch as the Idaho Supreme Court does "not recognize an independent right to effective assistance of counsel during post-conviction proceedings," id., Shearin's argument that the SAPD provided ineffective assistance in this appeal is not a viable claim.

Shearin has failed to show error in the district court's decision denying post-conviction relief.

## CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Shearin's petition for post-conviction relief.

DATED this 19th day of August, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of August, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Billy Raymond Shearin #37468
I.S.C.I., Unit 9, Tier C
P.O. Box 14
Boise, ID 83707

John C. McKinney
Deputy Attorney General

JCM/pm

# APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|---|---|
| BILLY RAYMOND SHEARIN,<br><br>Petitioner,<br><br>vs.<br><br>STATE OF IDAHO,<br><br>Respondent. | Case No. CV-PC-2012-03004<br><br>ORDER RE: HEARING ON PETITION HELD MAY 1, 2013 |

Presently before the Court is Mr. Shearin's petition for post-conviction relief, filed on February 21, 2012, and amended on August 30, 2012. On May 1, 2013, an evidentiary hearing was held on each of Mr. Shearin's claims for ineffective assistance of his trial counsel, Ms. Danica Comstock, in Ada County case number CR-FE-2011-009397. Specifically, Mr. Shearin alleges that Ms. Comstock rendered ineffective assistance by 1) failing to seek suppression of certain evidence; 2) failing to file an appeal when asked to do so; and 3) failing to file a Rule 35 motion when asked to do so.[1] Upon a favorable resolution of his claims, Mr. Shearin is seeking reinstatement of his appeal rights and whatever other relief this Court feels is appropriate. The Court denied the Rule 35 claim from the bench on the ground that it would not have granted such a motion even had it been filed, and took the remaining two issues under advisement. Having now fully considered the record, testimony, and arguments submitted by both sides, the Court issues the following memorandum decision and order for judgment in favor of the respondent on both of the remaining claims.

[1] Only the first two of these claims actually appear in the petitioner's amended petition; the Rule 35 claim, however, was tried by consent at the evidentiary hearing.

## I. BACKGROUND

On December 15, 2011, the petitioner following a plea of guilty was sentenced to 10 years in prison with 3 ½ years fixed and 6 ½ years indeterminate, for the crime of Burglary, a felony. He was given 178 days of credit for time served. In return for his plea of guilty, the state dismissed five other charges against the petitioner which included two additional counts of Burglary and three counts of petit theft. Upon conviction, the petitioner could have received sentences of up to 23 years of incarceration and $103,000.00 in fines on the dismissed counts. No appeal was filed in the case. At the times relevant to the petitioner's claim that evidence in this case was illegally obtained, he was on parole in Ada County case number H0600597, subject to the terms of a parole agreement reproduced as defendant's exhibit "A" admitted at the hearing on the petition. Condition number 8 of this agreement states that "Parolee will submit to a search of person or property, to include residence and vehicle, at any time and place by any agent of Field and Community Services and s/he does waive constitutional right to be free from such searching."

On or about February 21, 2012, the petitioner filed this petition for post-conviction relief *pro se*, asserting the aforementioned two instances of alleged ineffective assistance of counsel. For his first claim, he asserts that trial counsel was deficient in that she failed to file a motion to suppress evidence obtained from a search of his vehicle by Boise police that yielded incriminating evidence. More specifically, he argues that although the search was ostensibly justified pursuant to the terms of his parole, those terms did not authorize such a search except by the parole officer assigned to him, or at least by a parole officer acting in that officer's stead – yet police began searching his vehicle pursuant to condition 8 prior to the arrival of any representative of Field and Community Services at the scene of the search. The petitioner further

asserts that while a parole officer was in fact present at a subsequent search of his home which uncovered further incriminating evidence, the subsequent search was tainted by the earlier illegal search of the vehicle, which led to the search of his home.[2]

For his second claim, the petitioner asserts that his trial counsel was deficient in that she failed to file a notice of appeal on his behalf despite his request that she do so. He further asserts that he attempted to call his counsel to clarify the status of his appeal but was unable to contact her.

On March 12, 2012, the Court appointed counsel to assist the petitioner, and on March 14, 2012, Mr. John DeFranco entered an appearance as conflicts counsel on the petitioner's behalf. An amended petition was filed on the petitioner's behalf on August 30, 2012, and the state answered on April 18, 2013, denying the petitioner's claims but admitting that Boise police did search the petitioner's vehicle prior to the arrival of a representative of the Department of Probation and Parole at the scene of the search, and that a subsequent search of the defendant's home was conducted with a representative of the Department of Probation and Parole present. The state further admitted that trial counsel failed to file a notice of appeal, but denied the petitioner's claim that he directed her to do so. The state sought a denial of all claims contained in the petition or dismissal of the claims.

The Court then set the matter for evidentiary hearing, which took place as scheduled on May 1, 2013. At the hearing, the Court denied an additional claim for ineffective assistance of counsel (arising from counsel's alleged failure to file a Rule 35 motion when asked to do so) from the bench, taking the two issues outlined above under advisement.

---

[2] The state has not raised the inevitable discovery doctrine in opposition to the motion, so the Court will not address it here.

A. **Facts presented at the hearing.** The facts involved in this case are not substantially in dispute. The charges summarized above stemmed from the theft of high-end athletic apparel from a Fred Meyer store located on West Franklin and Overland Road in Boise, Idaho. On June 21, 2011, Boise police responded to a call from a loss prevention manager at the store's location. The manager had spotted Mr. Shearin in the store and, believing him to be involved in a series of thefts from Fred Meyer stores in other locations as well, called Boise police to alert them to his presence.

When officers arrived, Mr. Shearin was seen exiting onto and across Orchard Street without stopping at a stop sign. In the course of the resulting traffic stop, officers discovered that Mr. Shearin was driving on a suspended license and arrested him. Officers also learned that he was on parole, and contacted Mr. Bill Rowen, a supervisor at the Department of Probation and Parole, who in turn directed parole agent Layla Jeffries to respond to the location where the petitioner and his vehicle were located.

As stated, condition eight of the petitioner's conditions of parole, which he had initialed and signed in front of a notary on or about November 5, 2009, provides that "Parolee will submit to a search of person or property, to include residence or vehicle, at any time and place by any agent of Field and Community Services, and s/he does waive Constitutional right to be free from such searching." *See* Petitioner's Ex. "A". It is agreed in this case that the responding parole agent dispatched to the scene by the supervisor was agent Layla Jeffries, and that while on route, she authorized Boise police to conduct the search of the vehicle pending her arrival at the scene. It is undisputed that Ms. Jeffries was not the agent regularly assigned to the petitioner, but was dispatched by the on-duty supervisor because the petitioner's regular agent, Ms. Rhoda Faust, was attending a training program at the time.

Ms. Jeffries arrived at the scene after the search of the vehicle was begun, but before it was completed. She recalled seeing a duffel bag discovered by the police with what appeared to be stolen clothing in the trunk, but could not recall whether the trunk was open when she arrived. As a result of this discovery, Ms. Jeffries went with Boise police to the defendant's residence, and conducted a further search there. Ms. Jeffries did participate in this search, but concedes that Boise police did the majority of the searching while she remained with the petitioner. She further testified that in accordance with her usual practice in similar situations, she would have conducted the search of the petitioner's house whether the officers had suggested it or not.

Out of the preceding facts, the only significant conflicting testimony was between an officer of the Boise police, who believed that Ms. Jeffries requested the search to be started while she was on her way to the scene, and another officer who stated that the on-duty supervisor for the department of Probation and Parole had advised him that Boise police could search on behalf of the department while the supervisor arranged for a parole agent to come to the scene.

As to the petitioner's claims that Ms. Comstock failed to file a direct appeal and a motion under Idaho Criminal Rule 35 when asked to do so, the facts are not as clear. The petitioner states that he requested an appeal be filed. Ms. Comstock testified that she recalls no such request, and that given the absence of any notation in her file that such a request had been made, she did not believe it had been made. She further testified that had the petitioner clearly requested an appeal, her practice was to have the paralegal prepare the notice for filing immediately upon leaving the courtroom following sentencing, and that did not happen here. The defendant further stated that he tried to call Ms. Comstock several times to discuss an appeal with her, but could not get in touch with her. He admits, however, that he left no messages on these occasions.

## II. LEGAL STANDARDS

A. **PROCEEDINGS FOR POST-CONVICTION RELIEF.** Owing to the civil nature of proceedings for post-conviction relief, the burden is on the petitioner to substantiate his or her allegations by a preponderance of the evidence. *Gabourie v. State*, 125 Idaho 254, 256, 869 P.2d 571, 573 (Ct. App. 1994). Where a petition alleges ineffective assistance of counsel, mixed questions of fact and law are raised, and a trial court's factual findings will be upheld on review if supported by substantial evidence. *Id.* Findings of law based upon said factual findings are reviewed *de novo*. *Id.*

**B. INEFFECTIVE ASSISTANCE OF COUNSEL.** The issue of ineffective assistance of counsel is properly raised in a post-conviction setting. See *Mathews*, 839 P.2d 1215, 1219 (citing *Kraft v. State*, 100 Idaho 671, 674, 603 P.2d 1005, 1008 (1979). To prevail on a claim of ineffective assistance, a petitioner must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-03.

Claims alleging ineffective assistance of counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Under this test, the petitioner must not only demonstrate that counsel's performance was deficient, but must also show that the deficient performance was prejudicial. *Id.*, 466 U.S. at 687-88, 104 S.Ct. at 2064-65. To establish deficient performance, the applicant must prove that counsel's representation fell below an objective standard of reasonableness. *Id.* To prove prejudice, the applicant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694; *Parrott*, 117 Idaho at 274-75, 787 P.2d at 260-62. This latter "prejudice" requirement focuses on whether counsel's ineffective

performance impacted the outcome of the case. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71 (1985); *Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct.App.1992). In order to avoid summary dismissal, Petitioner must allege sufficient facts under both parts of the test. *Martinez v. State*, 125 Idaho 844, 875 P.2d 941 (Ct. App. 1994).

**C. FOURTH AMENDMENT TO THE U.S. CONSTITUTION**

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Similarly, Article I, § 17 of the Constitution of the State of Idaho provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

Neither a search warrant nor probable cause is needed for the search of a probationer's home where such a search is conducted pursuant to a valid regulation that satisfies the Fourth Amendment's reasonableness standard by requiring reasonable grounds for a search, because a state's operation of a probation system presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements. Probation, like incarceration, is a form of criminal sanction and a warrant or probable cause requirement would interfere with the supervisory relationship required for proper functioning of the system. *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987).

In *United States v. Shephard*, 21 F.3d 933 (9th Cir. 1998), the Ninth Circuit Court of Appeals ruled that the federal courts would look to state law to determine whether an arrest was

legal, in order to further determine if evidence discovered in a search incident to arrest should be suppressed. In that case, Montana law required a deputy to obtain written authorization from a probation officer prior to the deputy arresting a probationer for a probation violation. *Id.* at 936. After obtaining verbal permission from the defendant's probation officer to arrest the defendant upon suspicion that he had violated his probation, the arrest was accomplished and the arresting deputy proceeded into the defendant's apartment to retrieve the defendant's wallet at the defendant's request. *Id.* at 935. In the process of doing so, the deputy discovered a gun in plain view, the possession of which constituted a violation of the defendant's probation and also constituted the (federal) crime for which the defendant was convicted in the trial court. *Id.* The Ninth Circuit suppressed the evidence and reversed the conviction even though verbal permission to arrest had been obtained, and the defendant was required to submit to warrantless searches as a term of his probation, because the law was clear that the authority to arrest for violations of probation had to be in writing, and the gun was found incident to the arrest, and not as the result of a search. Therefore, because the arrest was illegal all the fruits thereof, to include the gun found in plain view, should have been suppressed. *Id.* That said, in dicta the Ninth Circuit indicated that if the issue was the legality of a *search* rather than an arrest followed by the discovery of contraband in plain view, the defendant's waiver of his Fourth Amendment rights as a condition of probation would have been relevant. However, the issue was the legality of the arrest which resulted in the finding of incriminating evidence; no "search" was conducted. *Id.* n.10.

In *U.S. v. Richardson*, 849 F.2d 439 (9th Cir. 1988), the Ninth Circuit made clear that the physical presence of a probation officer at the scene of a search conducted by the police in a case in which the probation officer had verbally authorized the search was not required, so long as the

probation officer was not merely acting as a "stalking horse" for the police. The Ninth Circuit stated:

> On balance we believe the Court approved the concept that the decision to authorize the search was more important than who was present when the search was made. Given the large case loads of most probation officers, requiring the probation officer's physical presence during every probation search or requiring close supervision of all probation searches would unnecessarily interfere with the twin goals of probation: rehabilitation of the probationer and protection of society.

*Id.* at 442. The Court also cited with approval the following language from *United States v. Jarrard*, 754 F.2d 1451 (9th Cir. 1985): "Parole and law enforcement officials frequently cooperate in the course of their work. Parole officers often receive information concerning their parolees that is uncovered in police criminal investigations. The fact that police investigation of [a crime] ... preceded the involvement of parole officials does not in itself indicate that the search was initiated by police officers." *Id.* at 441.

In an unpublished decision issued in 1995, the Ninth Circuit stated that "[a] probation officer is not a stalking horse if he, rather than the police, initiate[s] the search in the performance of his duties as a parole [or probation] officer. Officer Hook initiated each of the warrantless searches with the permission of her supervisor, and her reliance on the information provided by Detective Armstrong was proper. Officer Hook's request for police assistance to conduct the searches was proper. *Lewis v. Idaho State Bd. of Corr.*, 68 F.3d 480 (9th Cir. 1995).

The unique status of parolees vis a vis the Fourth Amendment was affirmed by the United States Supreme Court in the case of *Pennsylvania Bd. of Probation v. Keith M. Scott*, 524 U.S. 357, 118 S.Ct. 2014 (1998). In that case, the Supreme Court held that in a parole revocation hearing, the exclusionary rule did not apply to suppress evidence obtained in an illegal search which was used to prove the parolee's violation of parole, and which resulted in its revocation.

Although Justices Souter, Ginsberg, and Breyer dissented and described a probation revocation proceeding as "analogous" to a parole revocation hearing, it would appear that this ruling is limited to administrative actions by a parole board, and would not extend to a judicial proceeding before a trial court such as a probation revocation hearing. In any event, this Court believes a higher standard would be applied in probation revocation proceedings which, under Idaho law, are judicial and not administrative hearings.

Regardless of particular suppression issues, in a broader context the United States Supreme Court has made clear that both probationers and parolees have a diminished expectation of privacy when it comes to Fourth Amendment search and seizure law. In *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001), the Court upheld a provision in a California Court order providing that Knights was required to submit to a search at any time, with or without a search or arrest warrant or reasonable cause, by any probation or law enforcement officer. The specific language of the condition quoted by the Court stated that Knights would "[s]ubmit his person, property, place of residence, vehicle, personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." The Court pointed out that the language was unambiguous and that Knights had been unambiguously informed of the search condition when he signed his probation order, which further provided above his signature that "I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY THE SAME." Further, the Court was highly critical of the underlying Ninth Circuit decision which had found the search violative of the Fourth Amendment by citing to *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987). Of that decision the Supreme Court stated: "This dubious logic – that an opinion upholding the Constitutionality of a particular

search implicitly holds unconstitutional any search that is not like it – runs contrary to *Griffin's* express statement that its 'special needs' holding made it 'unnecessary to consider whether' warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment." (Internal citations omitted).

Nevertheless, the Supreme Court declined to adopt the government's position that the defendant's acceptance of the condition was voluntary because he could have rejected probation and gone to prison if he wished, and that the waiver was analogous to many voluntary decision made by defendants in criminal cases, such as waiving the right to trial in the course of a plea bargain. Instead, the Court stated that "we conclude the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances' with the probation search condition being a salient circumstance." (Internal citations and quotation marks omitted.) The Court then went on to state that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by 'assessing, on the one hand, the degree to which it is needed for the promotion of legitimate government interests.'" (Internal citations and quotations marks omitted.) The Court went on to hold that in assessing the degree to which Knights' privacy was intruded upon by the search at issue, "the probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights' reasonable expectation of privacy."

Further, the Court explained at length the governmental interests at stake:

> In assessing the governmental interest side of the balance, it must be remembered that "the very assumption of the institution of probation" is that the probationer "is more likely than the ordinary citizen to violate the law." The recidivism rate of probationers is significantly higher than the general crime rate. *See* U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Felons on Probation, 1986-89, pp. 1, 6 (Feb.1992) (reporting that 43% of 79,000 felons placed on probation in 17 States were rearrested for a felony within three

> years while still on probation); U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Probation and Parole Violators in State Prison, 1991, p. 3 (Aug.1995) (stating that in 1991, 23% of state prisoners were probation violators). And probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply . . . .
>
> The State has a dual concern with a probationer. On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community. The view of the Court of Appeals in this case would require the State to shut its eyes to the latter concern and concentrate only on the former. But we hold that the Fourth Amendment does not put the State to such a choice. Its interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen.

*Id.* at 120-21 (internal citations omitted). The Court then balanced the factors it had considered:

> We hold that the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.
>
> The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary.

*Id.* at 121-22 (internal citations omitted).

That said, the Court was unwilling to grant unfettered authority to the government to conduct warrantless searches of all probationers and parolees. In a footnote to the opinion, the

Court stated that "[w]e do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy (or constituted consent) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion." *Id.* at 120 n.6.

Clearly, *Griffin v. Wisconsin* does require an analysis of local law and regulations as well as probation or parole conditions actually imposed, and the defendant's knowledge of them, so as to balance the defendant's diminished expectation of privacy against the state's legitimate interest in maintaining the integrity of its parole and probation programs as required by *Knights*. It also seems clear that this Court must also consider the specific relationships between law enforcement officers and probation and parole agents and officers established under Idaho law, as was so clearly emphasized by the Ninth Circuit in *Shephard*, as part of the totality of the circumstances used to assess the reasonableness of the searches in the instant case consistent with *Knights*.

**D. <u>SEARCH AND SEIZURE OF PROBATIONERS AND PAROLEES</u>.** Idaho certainly adheres to a policy that recognizes that probationers and parolees have fewer rights in the nature of procedural due process in revocation proceedings than would an individual accused of a crime in a new criminal proceeding. The Idaho Rules of Evidence provide that they do not apply to proceedings to grant or revoke probation. I.R.E. 101(7)(e)(3). Nor do they apply to prison administrative and disciplinary proceedings. *Wolfe v. State*, 114 Idaho 659, 759 P.2d 950 (Ct. App. 1988).

The Idaho Constitution provides for state prisons and gives the state board of correction

"control, direction and management of . . . adult felony probation and parole, with such compensation, powers and duties as may be prescribed by law." Idaho Const. art. X, § 5. This provision has been interpreted by the Idaho Supreme Court to mean that the board of correction, acting through powers delegated by it to the Commission on Pardons and Parole, is not an agency within the meaning of the Administrative Procedures Act, and section 67-5215, Idaho Code, is inapplicable to a parole decision by the Commission of Pardons and Parole. *Carman v. State Comm'n of Pardons and Parole*, 119 Idaho 642, 809 P.2d 503 (1991).

Rules 6.01.01.701 and 702 of the Idaho Administrative Code provide as follows:

> **01. Search Of Home, Vehicle And Property.** Any person who resides with an offender under the supervision of the Department while on probation or parole or an offender released on furlough shall have the person's home, vehicle and property, both personal and real, subject to search by a probation and parole officer at reasonable times and in a reasonable manner to [sic] extent that the home, vehicle and property are accessible to the offender. The officer shall not need a warrant, reasonable suspicion, or probable cause. (11-5-99)
>
> **02. Visits At Place Of Employment.** Any person who employs an offender under the supervision of the Department while on probation or parole, an offender housed in a community work center, or an offender released on furlough shall have the offender's designated work areas subject to inspection by a probation and parole officer at reasonable times and in a reasonable manner. The officer shall not need a warrant, reasonable suspicion, or probable cause. (11-5-99)

Clearly, Idaho's policy as to searches of probationers or parolees is to exercise the broadest legal authority possible to allow warrantless searches of parolees and probationers, and of their residences, vehicles, property and jobsites, in order to assure the integrity of the state's probation and parole programs. Section 20-227, Idaho Code, provides that a probation or parole officer may arrest a parolee or probationer or may, in a writing described as an agent's warrant, deputize any other officer with the same power to arrest without a warrant for violations of the conditions of parole or probation. The warrant must state why the probation or parole officer

believes, in his judgment, that the supervised person has violated his conditions of probation or parole. However, this Court knows of no provision of law or regulation of the Board of Correction or Commission of Pardons and Parole purporting to require a similar writing to enable one deputized with the power to arrest for suspected violations of probation or parole to conduct a search of the parolee or his property. That said, Idaho requires conditions of probation to be in writing and to be given to the parolee. I.C. § 20-228. As to probation, it is the Court which has the authority to suspend sentence and place the defendant on probation "under such terms and conditions as it deems necessary and expedient." I.C. § 19-2601(2).

The Board of Correction is responsible for enforcing the observance of rules and regulations for parole or probation as established by the commission for pardons and parole or the courts. I.C. § 20-216. It is also charged with the duty of supervising all persons convicted of a felony, placed on probation, or released on parole, and of reporting alleged violations to the commission or the courts and to aid in determining whether the probation or parole should be continued or revoked. I.C. § 20-219.

Idaho has gone to some lengths to train probation and parole officers as professional law enforcement personnel, and to make clear that they are peace officers as well as probation and parole officers. They can function in both capacities. The fact that they operate in this dual capacity is not materially different than the fact that a traffic officer whose main function is traffic enforcement may also be called to arrest a shoplifter or armed robber, or a homicide detective may be called upon to pull over an intoxicated driver. These dual functions are not unique, but are common, especially where tight budgets and reduced personnel require them.

Section 19-5101(c), Idaho Code, defines "law enforcement" as "any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts,

prosecution, corrections, probation, rehabilitation, and juvenile delinquency." Section 19-5101(d), Idaho Code, defines "peace officer" in pertinent part as "any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision." Pursuant to section 19-5102(g), Idaho Code, the peace officer standards and training council includes in its membership "the director of the department of correction or his designee." Section 19-510A, Idaho Code, delegates the powers of a law enforcement officer to all employees of the state board of correction who receive certification from the Idaho peace officers standards and training council and also extends those powers to employees designated by the board of correction pursuant to section 20-209C when such employees are engaged in arresting persons who are suspected of having violated the terms and conditions of their probation, or when present with and at the request of local, state, or federal law enforcement officers.

When acting to enforce the terms and conditions of probation, whether alone or in conjunction with other law enforcement officers, it is clear that probation and parole officers are clearly law enforcement officers under Idaho law. Thus, any distinction claimed to exist between "police officers" and "probation officers" when dealing with suspected violations of probation or parole, based upon the primary classification of the officer and their unique and broadly-separated roles in other contexts, ignores the clear provisions of Idaho's constitutional and statutory framework. Clearly, the Idaho Supreme Court has had no difficulty in upholding the warrantless search of a probationer where a knowing waiver of Fourth Amendment rights has been executed by the probationer. *State v. Gawron*, 112 Idaho 841, 736 P.2d 1295 (1987). In

*Gawron*, the language of the waiver was broad: "That probationer does hereby agree and consent to the search of his person, automobile, real property, and any other property at any time and at any place by any law enforcement officer, peace officer or probation officer, and does waive his constitutional right to be free from such searches." *Id.* at 842, 736 P.2d at 1296. The Idaho Supreme Court drew no distinction between the rights of probation or parole officers and the rights of peace officers or law enforcement officers to conduct such a search.

In *Gawron* a Boise police officer (detective) found pawn tickets implicating Gawron in certain thefts. The detective noted that Gawron was on probation. He called the office of probation and parole and spoke to a supervisor about his suspicions. The supervisor agreed that a search of Gawron's residence was justified and the detective and the supervisor conducted the search, finding incriminating evidence. The Idaho Supreme Court stated that "if a defendant considers the conditions of probation too harsh, he has the right to refuse probation and undergo the sentence. If such a defendant desires to challenge the legality of any proposed conditions of probation, he may do so on appeal from the judgment, or on habeas corpus." *Id.* at 843, 736 P.2d at 1297. The Court used the following language to uphold the reasonableness of such searches: "[W]e hold that such persons conditionally released to societies have a reduced expectation of privacy, thereby rendering intrusions by government authorities 'reasonable' which otherwise would be unreasonable or invalid under traditional constitutional concepts." *Id.*

## III. ANALYSIS

**A. <u>COUNSEL'S FAILURE TO SEEK SUPPRESSION OF EVIDENCE DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.</u>** The Court finds the testimony of the police officers and the probation officer involved in these two searches to be credible. The police officers had a reasonable basis to believe that the petitioner was involved in

the illegal activity of burglary and theft from Fred Meyer stores based upon the statements made to them by the loss prevention manager. Even without such a reasonable basis, the stop of the petitioner's vehicle was appropriate since he had violated a traffic law due to the "California stop" observed by the officer. Further, the officer observed in plain view in the vehicle a piece of high end athletic clothing that appeared brand new, consistent with the loss prevention manager's beliefs that the petitioner was involved in the thefts of precisely this type of merchandise.

The Court further finds that after checking the petitioner's status and finding that he was on parole, it was appropriate for the officer to call the on-duty probation and parole supervisor and advise him of his concerns and suspicions, and it was appropriate for the probation supervisor to dispatch the nearest available parole officer to the scene and to give verbal authority to search pursuant to the terms of the petitioner's probation. The Court finds that the supervisor and the probation officer (Ms. Jeffries) were not "stalking horses" for a police investigation but had legitimate concerns regarding the petitioner's conduct on probation. Further, the Court finds that given the authority granted to them by the supervisor and taking into account all the surrounding circumstances, the police were acting as "agents" of Field and Community Services pursuant to the search condition in the petitioner's parole agreement, of which he was fully aware.

Moreover, it is irrelevant to the propriety of the vehicle search that the search was commenced by police prior to the probation officer's arrival on the scene. Neither federal nor Idaho law requires the probation officer to be physically present before a warrantless search commenced pursuant to a probationer's Fourth Amendment waiver and at the direction of the Department of Probation and Parole may be undertaken by police. While condition eight of the petitioner's parole agreement refers only to agents of Field and Community Services, the term

"agent" is undefined and, in view of the Idaho authorities set forth above, the Court believes it should be read to allow law enforcement personnel acting on the authority of Field and Community Services to conduct the searches contemplated by that condition, as was the case here. Idaho law requires terms not defined to be given their everyday meaning as commonly understood. I.C. § 73-113; *State v. Morris*, 28 Idaho 599, 155 P. 296 (1916).

As to the search of the petitioner's home, the Court finds that the discovery of clothing items in the trunk of the petitioner's vehicle with price tags still attached supplies ample basis for the warrantless search under federal and Idaho law, as well as the parole agreement, as set forth previously. This search fully meets the requirements of the Fourth Amendment of the U.S. Constitution and of Article 17 of the Idaho constitution as construed by the U.S. and Idaho Supreme Courts.

In the alternative to the above, as to the search of the petitioner's vehicle, the Court finds that the traffic stop was supported by reasonable suspicion and/or probable cause that the petitioner had violated traffic laws, and upon seeing apparel in plain view inside the vehicle consistent with information provided to police by Fred Meyer, police had reasonable suspicion and/or probable cause to search the rest of the vehicle for further evidence consistent with the reported thefts irrespective of the petitioner's Fourth Amendment waiver under the "automobile exception" to the search warrant requirement. *State v. Veneroso*, 138 Idaho 925, 929, 71 P.3d 1072, 1076 (Ct. App. 2003); *State v. Gallegos*, 120 Idaho 894, 898, 821 P.2d 949, 953 (1991). While the automobile exception obviously cannot be used to validate the warrantless search of the petitioner's home, it is undisputed that at that search a probation officer was physically present from the beginning, and actively participated in the search. Therefore, there is no question that the warrantless search of the petitioner's home was validly undertaken pursuant to

the petitioner's Fourth Amendment waiver even if a search warrant would otherwise have been required.

Having made these findings, the Court also finds that Ms. Comstock did not render ineffective assistance to the petitioner when she failed to seek suppression of the evidence discovered in each of the searches in issue, for the evidence here was properly obtained. Accordingly, there was no "fruit of the poisonous tree" to suppress; in fact, there was not even a poisonous tree, and any such motion was doomed to failure for the reasons specified above. Therefore, it was neither incompetent for Ms. Comstock to forego filing the motion nor prejudicial to the petitioner that she failed to do so, and the corresponding claim in the petition fails on the merits. *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). The Court emphasizes that even assuming, for the sake of argument, that a motion to suppress should have been filed, the second leg of the *Strickland* analysis is not met, for there was no prejudice to the defendant.

**B. COUNSEL'S FAILURE TO FILE A DIRECT APPEAL OF THE JUDGMENT DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.** As both counsel acknowledged at the hearing, the petitioner's claim that he unequivocally informed counsel at the sentencing hearing of his desire to appeal cannot be reconciled with Ms. Comstock's testimony that if such a request had been unequivocally made, she would have made a note of it in the petitioner's file and the appeal would have been noticed that very day, in accordance with her typical practice. Therefore, this Court is required to determine, from this conflicting testimony, whether in fact an unequivocal request was made.[3] This is the sole issue

[3] The parties concede that if an *equivocal* inquiry concerning an appeal were made, but not clarified to the point of certainty, it would not be ineffective assistance for counsel to neglect to pursue the issue further or to file an appeal upon her best guess concerning her client's wishes.

as to this claim because the parties agree that if an unequivocal request was made, and the appeal was not timely filed, the loss of the opportunity to appeal constitutes ineffective assistance of counsel without the need for further evidence.

The Court finds, based on the testimony provided at the hearing, that an unequivocal request was not made by the petitioner, or, if one was attempted, the attempt fell short of the efforts a reasonable person in the petitioner's position would have made in order to ensure that his wishes were known. The petitioner's testimony is that he made the request at the sentencing hearing, but he could not say with any certainty whether Ms. Comstock actually heard and understood him, since the request was likely made in haste as the next case was being called (perhaps while the petitioner was being taken into custody) rather than in conference with Ms. Comstock or under similar circumstances. That the petitioner had some doubts as to whether Ms. Comstock was aware that he wished to appeal is reflected in the fact that the petitioner called the office of the public defender on several occasions after he was sentenced to check on his case. Unfortunately, on each such occasion Ms. Comstock could not immediately answer the phone and, critically, the petitioner on each occasion chose not to leave any message. A reasonable person, wishing to appeal the judgment of conviction in his case, and knowing that he had not had an adequate opportunity to clearly apprise his attorney of his wishes, would not have contented himself with speaking to the "front desk" of the public defender's office and declining the invitation to leave a message. The petitioner admits that he left no messages, and this Court finds that this admission bolsters Ms. Comstock's testimony that no request was made (or at least heard), especially given that the petitioner's testimony concerning the rushed circumstances in which he allegedly made the request also supports Ms. Comstock's testimony that if such a request had been made, she did not become aware of it.

Further, the Court has been given no reason to doubt Ms. Comstock's testimony that had she been made aware of the petitioner's wishes, there would be documentary evidence in the petitioner's file with the public defender's office. Of course, this Court is not blind to the possibility that an absence of such evidence could easily be fabricated to avoid a charge of incompetent representation, but finds no reason to suspect such conduct here, where the only consequence of a simple admission by Ms. Comstock that she forgot to file the appeal would be the reinstatement of the petitioner's ability to appeal. In short, after considering all the relevant evidence, the Court credits Ms. Comstock's testimony that the petitioner never made his desire to appeal unequivocally known, and further finds her testimony to be the more credible. Accordingly, her failure to timely file a notice of appeal did not constitute ineffective assistance of counsel.

**CONCLUSION**

For the foregoing reasons, the Court finds in favor of the respondent on all the claims raised in the petition. A separate judgment will be filed reflecting the Court's decision in this matter.

SO ORDERED and dated this 30th day of May, 2013.

MIKE WETHERELL
District Judge

## CERTIFICATE OF MAILING

I hereby certify that on this 31st day of May, 2013, I mailed (served) a true and correct copy of the within instrument to:

ADA COUNTY PROSECUTING ATTORNEY
INTERDEPARTMENTAL MAIL

JOHN DEFRANCO
1031 E. PARK BLVD
BOISE, ID 83712

Christopher Rich
Clerk of the District Court

By _____
Deputy Court Clerk